IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants,

v.

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee.

No.....

PETITION FOR REHEARING

L. L. THOMPSON,
Attorney General of the State of Washington.

JOHN H. DUNBAR.
Assistant Attorney General of the State of Washington.
Attorneys for Appellants.

FRANK M. LAMBORN, PUBLIC PRINTER, OLYMPIA

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants,

v.

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee.

No.....

PETITION FOR REHEARING

L. L. THOMPSON,
Attorney General of the State of Washington.

JOHN H. DUNBAR.
Assistant Attorney General of the State of Washington.
Attorneys for Appellants.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWARD CLIFFORD, Superintendent of the Department of Labor and Industries of the State of Washington; and E. S. GILL, Supervisor of Industrial Insurance of the Department of Labor and Industries of the State of Washington,
Appellants,

v.

THOMAS W. MILLER, Alien Property Custodian of the United States of America,
Appellee.

No.....

PETITION FOR REHEARING

Come now the appellants by their attorneys and respectfully petition for rehearing in the above entitled case for the following reasons:

I.

In the opinion, this court states that the want of jurisdiction in the court below is the sole question presented for consideration, and the only question de-

cided in the opinion is that this action is not an action against the State of Washington.

The motion to dismiss the complaint was made on two grounds, namely, that the court had no jurisdiction over the persons of the defendants or either of them or the subject matter of the action, and also that the complaint did not state facts sufficient to constitute a cause of action. There was thus squarely raised the question whether the Trading with the Enemy Act applies to a state, which apparently, from the court's own language in the opinion, was not considered.

In defining the term "person" in the Trading with the Enemy Act, the term "state" was not used. The Trading with the Enemy Act was enacted for the purpose of restraining persons from giving aid and comfort to aliens in time of war to the end that our government might successfully prosecute the war and maintain its existence. We do not believe that it was the congressional apprehension that a state would give aid and comfort to aliens in time of war, nor that congress intended that the terms of the Trading with the Enemy Act should apply to a state.

II.

It was also argued both in appellant's brief and in the oral argument that the Trading with the Enemy Act is not applicable to a state where prop-

erty sought is not reduced to possession during the war. This argument is based on the principle that the Trading with the Enemy Act is in conflict with a state statute which was enacted by virtue of the police power of the state, and that congress has no power to enact legislation by virtue of the police power. The exception to this rule is that congress may so legislate during the war, but it is respectfully submitted that this power ceases when the war ceases. In other words, when the reason for the exception ceases, the exception itself ceases to exist. This contention, in so far as it appears in the court's opinion, was not considered.

III.

This is an action against the state. The case of *Board of Liquidation, et al., v. McComb,* 92 U. S. 531, is cited as an authority to the effect that the test of whether or not an action is one against the state is whether the officer is required to exercise any discretion in the act he is requested to perform. This test is apparently only applicable in cases of mandamus. Applying the rule announced in the McConnaughy case cited in the court's opinion, it would seem that this was in fact an action against the state. As a portion of the accident fund is used for the administrative expenses of the Department of Labor and Industries, and such a course was sustained by the

supreme court of this state in the case of *State, ex rel., Bloedel-Donovan Lumber Mills Company v. Clausen,* 22 Wash. Dec. 325, so that in its last analysis, the only thing affected by the judgment is a fund of the state. There is no claim here that the appellants are acting under the color of an unconstitutional statute, nor is there any showing or is it alleged that the appellee will suffer any injury if the appellants refuse to turn over these warrants. The real test is, who is affected by the judgment. This action is either against the state or it is against the appellants individually. Certainly it cannot be claimed that the judgment in this case in any manner, shape or form, affects the appellants individually.

The Langford case is distinguished in the opinion because there the judgment ordered the defendants to pay certain certificates of deposit, whereas in the present case, the judgment simply orders the marshal to seize the warrants that are issued and orders the appellants to deliver to the auditor vouchers for those warrants which are not issued, and that for this reason it is not a money judgment. While there is a distinction in fact on this point between the two cases, we do not believe that there is a legal distinction. In any event, under the decree entered in this case, the appellee is entitled to the possession of state warrants and he may do with them as he pleases.

He might hawk, barter and discount them on the market to the detriment of the State's credit.

"A warrant on a municipal corporation is a general order payable when the funds are found. *Shelley v. St. Charles County Court,* 21 Fed. 699. It is, in effect, in this state an assignment *seriatim* of that amount of the funds against which it is drawn." *State ex rel. Wehe v. Pasco Reclamation Company,* 90 Wash. 606. If the state refuse to pay these warrants by virtue of this court's language in distinguishing the Langford case, and an action were instituted against the state treasurer to compel him to pay said warrants, it might be contended that inasmuch as this court had held that the appellee was legally entitled to the possession of these warrants, it was his duty to pay said warrants and that his act in doing so would be purely ministerial in character and that he was acting in excess of his authority in refusing to make such payments, and that his act in refusing amounted to a tort, and that by reason of such tort, the plaintiff in the action had sustained a damage, and that for this reason it still would not be an action against the state. This would be doing, in a roundabout manner, exactly what the supreme court in the Langford case said could not be done, if this court's distinction of the Langford case is sound.

The issuance of a municipal warrant is an assignment of that amount of the funds against which it is

drawn. The result of the judgment entered in this case would be that the appellee is legally entitled to assignments of the accident fund of the State of Washington. We have always considered the issuance of state warrants and their payment, steps of equal legal significance in disbursing a state fund. Apparently this court holds, in distinguishing the Langford case, that the contrary is true. We assume that the court's holding is that the judgment entered in the district court does not compel the state to cash these warrants, but only decrees that the appellee is entitled to their possession, or otherwise the Langford case could not be distinguished from the case at bar. If this is the court's ruling, we respectfully petition that the opinion be modified to make this point more clear and specific, so that this court's opinion could not be *res adjudicata* to any defense that the state treasurer might interpose to an action instituted to compel him to cash such warrants.

It is also stated in the opinion that if an alien had prosecuted a similar suit to this in a proper court of the state, it would scarcely be contended that such a proceeding was a suit against the state. In the case of *Maddox v. Industrial Insurance Commission,* 119 Wash. 21, an injured workman instituted an action against the Industrial Insurance Division, and the court there held that the superior court had no jurisdiction of an action of this character; that his only

remedy was by appeal as prescribed in the Workmen's Compensation Act of this state. If such an action was not in fact an action against the state, it might properly be said that it could be waged. In any event, certainly an injured workman could not wage an action of that character in the district courts of the United States.

Respectfully submitted,

L. L. Thompson,
Attorney General of the State of Washington.

John H. Dunbar.
Assistant Attorney General of the State of Washington.

Attorneys for Appellants.

STATE OF WASHINGTON, }
County of Thurston, } ss.

JOHN H. DUNBAR, being first duly sworn on oath deposes and says: That he is one of the attorneys of record for the appellants in the above entitled case, and that he hereby certifies that, in his judgment, this petition for a rehearing is well founded, and that it is not ~~unjust for appellee~~ interposed for delay.

John H. Dunbar

Subscribed and sworn to before me this 22 day of March, 1923.

Clyde G. Jeffers

Notary Public in and for the State of Washington, residing at Olympia.